[redacted]

INDEX

	Page
Opinion below	1
Jurisdiction	1
The question	2
Regulations involved	2
Statement	3
Summary of argument	8
Argument:	
I. The postmaster's bond covered a loss of registered mail	10
II. The regulations bearing on the liability of a postmaster for loss of registered mail while in his custody and not properly cared for are not clear, but are fairly susceptible of the construction that the postmaster is liable, although there is no evidence that the lack of care caused the loss	11
III. There is no question that the postmaster, Deal, violated various regulations with respect to the care of registered mail and did not use due care in the protection of the package from which the currency was stolen	19
IV. The other points discussed in the petitioners' br ef do not disclose any ground for reversing the judgment below	21
V. If the matter is entitled to consideration by this court, the petitioners are probably entitled to modification of the judgment of the Circuit Court of Appeals as to the costs to be taxed against them	23
Conclusion	28

CITATIONS

Cases:	
Gibson v. *United States*, 208 Fed. 534	11
Kane v. *Luckman*, 131 Fed. 609	25
Kirby v. *United States*, 273 Fed. 391	26
National Surety Co. v. *United States*, 129 Fed. 70	11
Pine River Logging Co. v. *United States*, 186 U. S. 279	25
Smyer v. *United States*, No. 131, October Term, 1926, decided February 21, 1927	8
Spencer v. *Peterson*, 41 Oreg. 257	25

Cases—Continued. Page
Steamer Coquitlam v. *United States*, 163 U. S. 346 26
Summers v. *United States*, 231 U. S. 92 26
Sun Printing & Publishing Association v. *Moore*, 183 U. S. 642 12
Sturm v. *Boker*, 150 U. S. 312 12
United States v. *American Surety Co.*, 155 Fed. 941 11
United States v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 235 Fed. 951 25
United States v. *Sanborn*, 135 U. S. 271 23
United States v. *United States Fidelity & Guaranty Co.*, 247 Fed. 16 11
United States Fidelity & Guaranty Co. v. *United States*, 229 Fed. 397 11
Statutes, etc.:
Act of May 9, 1888, c. 231, 25 Stat. 135, as amended by the act of June 11, 1896, c. 424, 29 Stat. 458 18
Act of September 19, 1922, c. 344, 42 Stat. 848 26
Act of March 4, 1925, c. 526, 43 Stat. 1264, 1265 27
Judicial Code, sec. 240 (a), as amended by the act of February 13, 1925, c. 229, 43 Stat. 936, 938 2
Revised Statutes, sec. 3846 7
Compiled Laws of Alaska, sec. 1462 10, 23, 26, 27
Postal Laws and Regulations:
1879 Ed., sec. 492 16
1887 Ed., sec. 700 16
1893 Ed., sec. 669 17
1902 Ed.—
Sec. 278 17
Sec. 864 18
1913 Ed.—
Sec. 150 18
Sec. 291 2, 8, 9, 11, 13
Sec. 361 20
Sec. 524 21
Sec. 885 21
Sec. 940 3, 9, 14
Postal Guide, 1920, par. 20 20

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 344

T. H. DEAL AND UNITED STATES FIDELITY & Guaranty Company of Baltimore, Maryland, petitioners

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 539) is reported in 11 F. (2d) 3.

JURISDICTION

The judgment sought to be reviewed was entered by the Circuit Court of Appeals for the Ninth Circuit on February 15, 1926. (R. 553.) On March 22, 1926, a petition for rehearing was denied. (R. 554.) Petition for certiorari was filed April 17, 1926, and granted May 24, 1926. (R. 559.) The jurisdiction of this Court to issue the writ is

found in Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 229, 43 Stat. 936).

THE QUESTION

The only important question presented in the petition for certiorari is whether a postmaster and the surety on his bond are liable for theft of the contents of a registered package while in his post office and not cared for with due care or as required by the regulations of the Post Office Department, although there is no proof that the negligence or failure to obey the regulations was the proximate cause of the loss.

REGULATIONS INVOLVED

Section 291 of the Postal Laws and Regulations (1913), which were in force at the time the matters in controversy occurred, provides (italics ours):

> *When a post office has been robbed,* the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. *The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the*

property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise.

2. All subsequent developments shall be reported to the same officers.

3. Brief telegraphic report of the robbery of a post office should also be made when practicable to the post-office inspector in charge of the division in which the post office is located (see sec. 35), the telegram to be sent "collect" and indorsed "Official business, collect Government rate."

Section 940 of said Postal Laws and Regulations provides:

> Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations.

The regulations which were violated by the postmaster will be found on pages 19–21 of this Brief.

STATEMENT

The petitioner Deal was postmaster at Fairbanks, Alaska, at the time in question in the case. (R. 5.) The petitioners executed and delivered to the

United States an official bond conditioned that Deal should "faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Post Office Department * * *." (R. 4, 9.)

On September 15, 1921, the First National Bank of Fairbanks delivered to the register clerk at the Fairbanks post office a package to be registered, containing $9,900 in currency and $37.65 in silver, addressed to Frank Doner, Healy, via Nenana, Alaska. (R. 46–48, 122–124.) The money belonged to the United States and was sent to Doner as disbursing agent for the Alaskan Engineering Commission, a governmental agency. (R. 37, 41, 42.)

The register clerk, Miss Houck, registered the package. She testified that she thought the package contained money, but was not sure. (R. 54.) She placed the package in a basket behind her (R. 55), and another post-office clerk, Miss Smith, took it and placed it in another basket, where it remained for an hour or so (R. 62). Miss Smith placed the package in a jacket or container, around which she tied a string, and put it in a small safe in the post office. (R. 62–64.) She put the safe on the day combination, which meant that the knob of the combination was turned about three points (R. 65, 69), and the next morning when she took the package out of the safe she found the safe still on the day combination (R. 65). Mr. Deal himself

testified that on the night of September 15th the safe was on the day combination. (R. 312.)

About eight o'clock on the evening of September 15th Mr. Hering, who had formerly been, but was no longer, employed at the post office, got the key of the office from Mr. Deal, the postmaster, and entered the office to place some mail in the outgoing sacks and get the mail from his box. (R. 105–109.)

On the morning of September 16th Miss Smith took the package from the safe, and without opening the jacket placed it in the pouch containing mail for Nenana, which Mr. Deal locked. (R. 65, 66.) When the package arrived at Nenana it was found that the canvas sack in which the bank had shipped the money had been slit and then fastened with a nail, and the currency had been extracted and a magazine put in its place. (R. 184–189.)

There was evidence bearing on the question whether the sack had been opened at Fairbanks. (R. 209, 210, 237–239, 241, 242.)

There was much testimony concerning the transportation of the package from which the currency was stolen from the time it left the post office at Fairbanks until it was opened by the agent of the addressee and the robbery discovered. (R. 83–147, 154–205, 259–275.) This indicated that the robbery could not have occurred after the package left the Fairbanks post office and was sufficient to justify the jury in finding that the robbery occurred while

the package was still in that post office, and the jury did so find, because whatever other inconsistencies there were in the charge of the trial court it consistently charged that no recovery could be had unless the loss occurred in the Fairbanks post office.

The trial judge attempted to submit the case to the jury on three different theories. One theory was that the postmaster could be held liable for the loss of money only if guilty of negligence as the result of which the loss occurred. In charge No. 13 (R. 392) the court charged that unless the jury found—

> the loss was occasioned by his carelessness or negligence by reason of his disregard of the law or regulations * * * your verdict must be for the defendants.

And in charge No. 15 (R. 394) it said that the failure of a postmaster, which produces a loss, to observe the postal regulations renders him liable for loss of registered matter. In charge No. 16 (R. 395) and charge No. 25 (R. 402) it dealt again with the case on the basis of negligence.

Another theory on which part of the charge was based was that to hold the postmaster liable it must appear that he violated some regulation respecting the care of the registered package, but that it was not necessary to show that the violation of the regulation was the proximate cause of the loss. Such a theory is reflected in charge No. 19 (R. 397), charge No. 21 (R. 398), charge No. 24 (R. 401), charge No. 26 (R. 403), and charge No. 27 (R. 403).

A third theory was that if the postmaster knew that the registered package contained money and that the money was the property of the United States he was absolutely liable for the loss thereof as an insurer, whether or not he was in any way at fault. This theory was presented to the jury in charge No. 22. (R. 399.)

The Circuit Court of Appeals rejected the theory that a postmaster is absolutely liable as an insurer for loss from a registered package containing money belonging to the United States and held that the twenty-second charge of the trial court applying that theory was erroneous. (R. 544, 549.)

It adopted the theory that proof of violation of some regulation respecting the care of the registered package was sufficient to impose liability on the postmaster, without any evidence to show that the violation of the regulation was the proximate cause of the loss. (R. 545, 546.) It held that since it conclusively appeared and was admitted that the postmaster violated the regulations respecting the care of the registered package the error contained in the twenty-second charge of the trial court was without prejudice. (R. 549, 550.)

We believe that the Circuit Court of Appeals was right in rejecting the theory that a postmaster is absolutely liable as an insurer for loss of a registered package containing money belonging to the United States. Such money is not public money within the meaning of Section 3846 of the Revised

Statutes. See *Smyer* v. *United States,* No. 131, October Term, 1926, decided February 21, 1927.

We further believe that on the evidence in the case the jury would have been justified in finding that the loss was due to the postmaster's negligence and failure to comply with regulations relating to the care of the registered package. The jury, however, was not given the case on that theory alone. This seems to narrow the case down to the single question of law, whether under Section 291 of the Postal Regulations, a postmaster may be held liable for theft of the contents of a registered package while it is in his custody and not guarded as required by the regulations, without any proof that the negligence or failure to obey the regulations caused the loss or brought about the theft.

This question, not presented in any large number of pending cases and involving construction of a doubtful regulation which may be amended to remove ambiguity, we should not have presented to this Court if the decision below had been unfavorable to the United States.

SUMMARY OF ARGUMENT

I. It is not and can not be questioned that the postmaster's bond covered a loss of registered mail.

II. The regulations bearing on the liability of a postmaster for loss of registered mail while in his custody and not properly cared for are not clear, but are fairly susceptible of the construction that the postmaster is liable, although there is no evi-

dence that the lack of care caused the loss. Section 291 of the 1913 edition of the Postal Laws and Regulations, dealing with robbery of post offices, makes the postmaster responsible if he fails to exercise due care in the protection of the property, and there is no intimation in its language that responsibility results only if the loss is the proximate result of the failure to exercise due care. That losses of registered mail in the robbery of a post office are covered by this provision of Section 291 and not by Section 940 is indicated by the fact that registered mail is specifically referred to in other portions of Section 291, by the location of the sections in the Postal Laws and Regulations, and by sections similar to Section 291 in earlier editions, which specifically referred to registered mail, since it can not be presumed that the general language used in Section 291 was intended to change the rule as to registered mail.

III. There is no question that the postmaster, Deal, violated various regulations with respect to the care of registered mail and did not use due care in the protection of the package from which the currency was stolen, and therefore the judgment below should be affirmed if under the regulations responsibility in such a case does not depend upon a showing of proximate cause.

IV. The other points discussed in the petitioners' brief do not disclose any ground for reversing the judgment below.

V. If the matter is entitled to consideration by this Court, the petitioners are probably entitled to modification of the judgment of the Circuit Court of Appeals as to the costs to be taxed against them. Under Section 1462 of the Compiled Laws of Alaska the taxable costs included mileage of witnesses from any point within the district, or from the district line to the place of trial and return, but mileage of witnesses outside of the district should not have been included.

ARGUMENT

I

THE POSTMASTER'S BOND COVERED A LOSS OF REGISTERED MAIL

It is not questioned that the postmaster's bond was intended to cover loss of registered mail, whether or not owned by the United States. The bond ran to the United States as obligee. Its condition was (R. 9)—

> That if the said Thomas H. Deal shall faithfully discharge all duties and trusts imposed on him as postmaster either by law or by the regulations of the Post Office Department, * * * then this obligation shall be void * * *.

Even though neither the bond nor any statute or regulation provide expressly that the bond shall inure to the benefit of any person sending registered mail, the law seems to be settled that the United States may maintain an action on such a bond to recover for the loss of registered mail matter belonging to private citizens, and in such an

action may recover the full value of the property lost, and not merely the amount for which the United States may be liable, the United States being under a moral if not a legal obligation to turn over the proceeds of the suit to the person suffering the loss.

National Surety Co. v. *United States,* 129 Fed. 70.

United States v. *American Surety Co.,* 155 Fed. 941.

Gibson v. *United States,* 208 Fed. 534.

United States Fidelity & Guaranty Co. v. *United States,* 229 Fed. 397.

United States v. *United States Fidelity & Guaranty Co.,* 247 Fed. 16.

If a suit may be maintained by the United States on such a bond to recover the value of loss of registered mail belonging to a citizen, there seems to be no reason why the United States may not maintain a suit on the bond for its own benefit where it happens to be the owner of the contents of a registered-mail package.

II

THE REGULATIONS BEARING ON THE LIABILITY OF A POSTMASTER FOR LOSS OF REGISTERED MAIL WHILE IN HIS CUSTODY AND NOT PROPERLY CARED FOR ARE NOT CLEAR, BUT ARE FAIRLY SUSCEPTIBLE OF THE CONSTRUCTION THAT THE POSTMASTER IS LIABLE, ALTHOUGH THERE IS NO EVIDENCE THAT THE LACK OF CARE CAUSED THE LOSS

Section 291 of the 1913 Edition of the Postal Laws and Regulations, dealing with robbery of post offices, contains the clause:

> The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property.

There is no intimation in this language that responsibility results only if the loss is the proximate result of the failure to exercise due care. Taking the words used at their face value, they mean that a failure to properly protect the property, followed by a robbery during the time such failure exists, is sufficient to impose responsibility, although there is no direct proof that the failure to use due care produced the loss. As pointed out by the Circuit Court of Appeals, it is often difficult to determine whether negligence of the postmaster has contributed to a loss of property stolen from a post office. The exact circumstances of robberies are rarely known, and the postal authorities may well have thought that a postmaster who does not use due care to protect property in his possession should be responsible for any loss by robbery which may occur, without casting upon the owner of the property, who is entirely innocent, the often impossible burden of showing the circumstances surrounding the loss.

And while a bailee is ordinarily liable only for negligence, there is nothing to prevent him from enlarging his legal responsibility by contract, express or implied. (*Sturm* v. *Boker,* 150 U. S. 312, 330; *Sun Printing & Publishing Assn.* v. *Moore,* 183 U. S. 642, 654.)

A more serious question is whether the word "property" in the clause of Section 291 quoted above includes registered mail or refers only to Government property. The clause is immediately preceded by a provision that when a post office has been robbed the postmaster shall report, if possible—

> all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property.

The clause is immediately followed by the following:

> If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported.

The location of the clause relating to responsibility, between the provisions as to what shall be reported, is illogical, but there is nothing in the structure of the paragraph which can properly be regarded as restricting the word "property" as used in the clause to Government property. The paragraph as a whole relates to registered mail as well as to Government property, and even if it be admitted that the language preceding the clause is to be given more weight than that following it in determining the meaning of the word "property," the provision preceding requires "a detailed inven-

tory of the loss," which undoubtedly includes registered mail as well as Government property.

The petitioner contends that the liability of a postmaster for loss of registered mail, resulting from robbery of a post office, as well as otherwise, is governed by Section 940 of the Regulations, making the postmaster responsible "for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations." The Circuit Court of Appeals said (R. 547):

> There is no conflict between Sections 291 and 940. The latter defines the general responsibility of postmasters and the former their responsibility when post offices are robbed.

Section 291 is a part of Subdivision V of Chapter 3 of Title Three of the Postal Laws and Regulations. The subject of Title Three is "Post Offices." Chapter 3 thereof is entitled "General Provisions Relating to Post Offices." Subdivision V is entitled "Miscellaneous Provisions."

Section 940 is a part of Subdivision V of Chapter 1 of Title Six of the Postal Laws and Regulations. The subject of Title Six is "Registry System." Chapter 1 thereof is entitled "Registration of Domestic Mail Matter." Subdivision V is entitled "Treatment of Registered Matter at Offices of Delivery."

The petitioner, taking issue with the Circuit Court of Appeals, contends that Title Three con-

tains general provisions and Title Six particular provisions. It is apparent that the distinction is meaningless. Title Three contains general and particular provisions relating to post offices and Title Six contains general and particular provisions relating to the registry system. Section 940, relating to "the wrong delivery, depredation upon, or loss of any registered letter or parcel," does not specifically include a loss in the case of a robbery of a post office. Section 291, relating to "when a post office has been robbed," does specifically refer to losses of registered mail in such robberies. It would, therefore, seem that the responsibility of a postmaster for loss of registered mail in the robbery of a post office should be governed by Section 291 and not by Section 940.

Moreover, Chapter 8 of Title Three is entitled "Care of Public Funds and Property—Deposits of Surplus Funds," and Chapter 11 of Title One is entitled "Losses of Funds and Stamped Paper." If the provision in Section 291 relating to a postmaster's responsibility for losses applied only to losses of Government property, it might more properly have been included in one of these chapters dealing with Government property than in Chapter 3 of Title Three, which contains "General Provisions Relating to Post Offices."

Specific provision as to the liability of the postmaster in case of robbery of a post office appears for the first time in the 1879 edition of the Postal

Laws and Regulations. Section 492 provided (italics ours):

> Postmasters to immediately Report Robbery of Post Office.—Whenever a post office has been robbed the postmaster will immediately report all the facts to the Chief Special Agent, and to the nearest resident Special Agent. This report must state as fully as possible all the circumstances connected with the robbery, giving the date and extent of the loss. He must be careful to state whether the loss consists of stamps, stamped envelopes, postal cards, letters (stolen or rifled), postal or money-order funds, or Government property. If the loss includes the mail key the number should be given; and if registered or ordinary mail matter, he must be particular to state whether the same was rifled or taken from the post office. He must give all the information in his possession relating to each lost or rifled registered letter, such as post office where mailed, date of mailing, number of letter and registered-package envelope, by whom written, to whom addressed, and contents. *For the value of registered or ordinary mail lost by robbery of post offices postmasters will be held responsible if, upon investigation, it appears that due care was not taken to secure the mail matter from depredation.*

And this section was contained in Title II, entitled "Post Offices and Postmasters," not in Title V, entitled "The Registry System."

Section 700 of the edition of 1887 contained the following:

> For the value of registered or ordinary mail matter lost by robbery of post offices, the postmaster may be held responsible to the losers, if upon investigation it appears that due care was not taken for the protection of the property.

Section 669 of the edition of 1893 was the same as section 700 of the edition of 1887.

Section 278 of the edition of 1902 contained the following:

> For the value of registered or ordinary mail matter lost by robbery of post offices, the postmaster will be held responsible, if upon investigation it appears that due care was not taken for the protection of the property.

Each of these sections related to the report to be made "when a post office has been robbed" and was contained in the Title relating to "Post Offices and Postmasters," not in the Title relating to "The Registry System." It seems inconceivable that the post-office authorities intended, by the general language used in Section 291 of the edition of 1913, to eliminate from the provision as to responsibility, responsibility for registered mail, which had been covered by similar sections since 1879. It is much more probable that in using the more general language in the 1913 edition—

> The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property—

the post-office authorities intended to broaden the effect of the section to include Government prop-

erty as well as "registered or ordinary mail lost by robbery of post offices."

It is also worthy of note that Section 864 of the 1902 edition of the Postal Laws and Regulations was substantially similar to section 940 of the 1913 edition, and apparently was not regarded as inconsistent with Section 278, *supra,* although the latter section expressly referred to "registered or ordinary mail matter lost by robbery of post offices."

Petitioners lay considerable stress on the Act of May 9, 1888, c. 231, 25 Stat. 135, as amended by the Act of June 11, 1896, c. 424, 29 Stat. 458, which is embodied in the 1913 Postal Laws and Regulations as Section 150, and which authorizes the Postmaster General—

> to investigate all claims of postmasters for the loss of money-order funds, postal funds, postage stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other unavoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed * * *.

The argument is that since provision is made in the case of loss of Government property for relieving a postmaster from the consequences of the responsibility imposed by Section 291, where the loss resulted from no fault or negligence on the

part of the postmaster, and no similar relief can be granted in the case of loss of registered mail, Section 291 must be construed as not applying to losses of registered mail.

But it should be noted that no construction of Section 291 can put responsibility for loss of registered mail on the same basis as responsibility for the loss of Government property. In the case of Government property a postmaster is "responsible for the loss if he fails to exercise due care in the protection of the property," but may be relieved, under the provisions of the statute, if it affirmatively appears "that such loss resulted from no fault or negligence" on the part of the postmaster. In the case of registered mail, either a postmaster "is responsible for the loss if he fails to exercise his due care in the protection of the property" and can not be relieved except by Act of Congress, or a postmaster is under absolutely no responsibility, although he used no care in the protection of the property, unless the United States can affirmatively prove that the failure to exercise due care was the proximate cause of the loss. We believe the former rule was the one intended by the postal authorities.

III

THERE IS NO QUESTION THAT THE POSTMASTER, DEAL, VIOLATED VARIOUS REGULATIONS WITH RESPECT TO THE CARE OF REGISTERED MAIL AND DID NOT USE DUE CARE IN THE PROTECTION OF THE PACKAGE FROM WHICH THE CURRENCY WAS STOLEN

The petitioners concede that the postmaster, Deal, violated various regulations with respect to the

care of the package from which the currency was stolen (Brief 16), and therefore the judgment below should be affirmed if, under the regulations, responsibility in such a case does not depend upon a showing of proximate cause. Under the circumstances no extended discussion of the regulations violated is necessary, but it may be of assistance to the Court if we refer to them briefly.

The Circuit Court of Appeals referred to Section 361 of the 1913 Regulations, which requires safes to be carefully and completely locked at night and not fastened only with a day combination, and further requires a postmaster to change the combination immediately whenever a safe is procured. That section is in chapter 8 of Title Three, which is entitled "Care of Public Funds and Property—Deposits of Surplus Funds." Consequently we do not believe it is applicable to registered mail.

But paragraph 20 of the 1920 Postal Guide (R. 294) provides:

> Registered articles known or presumed to contain large values, such as coin, currency, securities, etc., to be made the object of special care, in so far as practicable, both at post offices and while in transit. Such articles, as far as practicable, should be given proper vault or safe protection, handled under the supervision of responsible supervisory officials or employees, and such receipts should be taken, and care exercised in billing and checking as will make it possible to place responsibility in cases of loss or depredation.

That regulation says nothing about combinations of safes, but it does require registered articles presumed to contain large values to be given proper vault or safe protection, and placing a valuable money package in an iron safe on a day combination overnight, so that anyone of a number of postal employees could open the safe or anyone ignorant of the combination could open it by merely turning the dial a few points to the right, was not proper safe protection, so that the Circuit Court of Appeals was right in saying that a violation of the regulations had occurred with respect to the care of this registered package.

There was also a violation of Section 524 of the Regulations (R. 543) in allowing one not an employee of the Department to have access to mail matter. A man formerly employed in the post office was allowed to enter it the evening of September 15th to get some mail and to dispatch some in the outgoing sacks.

We believe there was also a violation of Section 885, which provides:

> All registered matter shall be kept separate from ordinary matter, and properly protected from accident or theft.

IV

THE OTHER POINTS DISCUSSED IN THE PETITIONERS' BRIEF DO NOT DISCLOSE ANY GROUND FOR REVERSING THE JUDGMENT BELOW

Point II of the Petitioners' Brief is devoted to a discussion of the allegations and evidence which

would have been necessary to sustain a recovery on the theory that the postmaster was absolutely responsible as an insurer for registered mail containing money belonging to the United States. The Circuit Court of Appeals rejected that theory and we do not rely on it. The discussion has no bearing upon the question now before the Court.

Point III and part of Point IV of the Petitioners' Brief point out certain supposed infirmities in the pleadings and proof on the theory that liability is dependent upon causal connection between the postmaster's negligence and the loss. This theory, again, is not the one adopted by the Circuit Court of Appeals nor the one upon which we rely.

The only remaining contention made in the Petitioners' Brief is that the evidence was insufficient to support the verdict as the facts and circumstances that were consistent with the theory that the loss occurred in the Fairbanks post office were equally consistent with the theory that it occurred while the package was being transported to Nenana.

As hereinbefore shown, the evidence was ample to justify the jury in finding that the robbery occurred while the package was in the Fairbanks post office, and the jury did so find. This finding has been sustained by the District Court and the Circuit Court of Appeals, and we believe it can not be questioned now.

V

IF THE MATTER IS ENTITLED TO CONSIDERATION BY THIS COURT, THE PETITONERS ARE PROBABLY ENTITLED TO MODIFICATION OF THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS AS TO THE COSTS TO BE TAXED AGAINST THEM

Although the petition for writ of certiorari contained no complaint of the judgment of the Circuit Court of Appeals with respect to the costs to be taxed, the petitioners now urge that the judgment contains certain errors in this respect.

The first complaint is as to the allowance of any costs for the attendance of the witness James Hagan because he was a deputy United States Marshal, who was paid nothing for his attendance and who traveled on a pass on the Government railroad. The Circuit Court of Appeals held that his necessary expenses in going to, returning from, and attendance on the court were taxable as costs, and this is clearly right. (*United States* v. *Sanborn*, 135 U. S. 271.)

The costs taxed included mileage for certain other witnesses subpœnaed from various points, both within and without the District of Alaska. (R. 428, 429.) Section 1462 of the Compiled Laws of Alaska reads:

> A witness is not obliged to attend for oral examination or otherwise at a place distant more than one hundred miles from the place

> where he resides or at which he may be served with a subpœna; except that in an action or proceeding pending in a court of record the court or judge thereof, upon the affidavit of the party, or some one on his behalf, showing that the testimony of the witness is material and his oral examination important and desirable, may indorse upon the subpœna an order for the attendance of the witness; the service of such subpœna and order and the payment of legal fees to the witness are sufficient to require his attendance, if he be served within the district.

It was stipulated that as to each of the witnesses in question no affidavit was filed or order indorsed on the subpœna as required by the above statute. (R. 443, 444.) The petitioners contend that for this reason the costs taxed should have included mileage for only 200 miles for each of these witnesses.

The Circuit Court of Appeals, apparently through oversight, treated the question as if all of the witnesses were subpœnaed within the district. (R. 551.) It held that mileage is recoverable only for such distance as is necessarily traveled from a place to which a subpœna will run; that a subpœna will run to any point in the territory; that the effect of Section 1462 *supra* is to relieve the witness from the burden of attending unless the subpœna is indorsed as provided therein; that the adverse party is not entitled to complain of the failure to indorse on the subpœna an order requiring the

attendance of the witness; and that if he attends his mileage and per diem may be taxed. (R. 551, 552.)

As to the witnesses subpœnaed within the District, we think the Circuit Court of Appeals was clearly right. The purpose of Section 1462 can be only for the protection of witnesses. The adverse party is not interested in the particular procedure adopted to compel the attendance of witnesses, but only in being protected from unreasonable and unnecessary costs. This protection is furnished him without the statute. A court should always disallow unnecessary and unreasonable items of costs. (*Pine River Logging Co.* v. *United States*, 186 U. S. 279, 297; *United States* v. *Minneapolis, St. P. & S. S. M. Ry. Co.* (D. C. Minn.), 235 Fed. 951; *Kane* v. *Luckman* (C. C. Iowa), 131 Fed. 609, 621; 15 C. J. 146.) The petitioners do not show that the attendance of the witnesses in question was unreasonable or unnecessary (R. 438), and the District Court, which was in the best position to judge, must have determined that it was not. Petitioners have relied on the technical position that they are protected by the statute from the taxation of mileage for over 200 miles, and this position is not sound. (*Spencer* v. *Peterson* (Oregon), 41 Ore. 257, 263.)

As to the witnesses subpœnaed at points without the district the situation is different. The weight of authority in the Federal courts, as stated by the Circuit Court of Appeals, is that mileage is taxable only for such distance as is necessarily traveled by

for the protection of witnesses, and an adverse party can not take advantage of failure to obtain such permission. It follows that if the court in this case is to be regarded as a District Court of the United States and not as a territorial court the judgment of the Circuit Court of Appeals as to costs was right and should be affirmed.

CONCLUSION

The judgment of the Circuit Court of Appeals should be modified as to costs and in other respects affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
GARDNER P. LLOYD,
Special Assistant to the Attorney General.

APRIL, 1927.

○